

No. SD 24421

IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

KENNETH STELLWAGON,

Respondent,

v.

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant.

Appeal from the Greene County Circuit Court
The Honorable Mark Fitzsimmons, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

Respondent adopts the Jurisdictional Statement of
Appellant.

STATEMENT OF FACTS

Respondent concurs with Appellant's Statement of Facts with one exception. In paragraph one of Appellant's Statement of Facts, the Appellant erroneously states that the legal file shows that Respondent was represented by Counsel in his 1997 Municipal DWI case. Nowhere does it appear in the record that the Respondent was represented by Counsel or waived his right to Counsel in the 1997 Municipal case. With this exception Respondent agrees with the Appellant's Statement of Facts.

POINT RELIED ON

The trial court did not err in setting aside the Appellant's suspension of Respondent's driver's license and the five year denial of Respondent's driving privileges because the Appellant failed to prove that in the Springfield Municipal DWI conviction that Respondent either was represented by an attorney or waived his right to an attorney in writing as required by Section 302.060(10) R.S.Mo. 2000.

Hadlock v. Director of Revenue, 860 S.W.2d 335, 338 (Mo.banc. 1993);

Murphy v. Carron, 536 S.W.2d 30 (Mo.banc. 1976);

Section 302.060(10) RSMo 2000;

Section 302.535.1 RSMo 2000.

ARGUMENT

The trial court did not err in setting aside the Appellant's suspension of Respondent's driver's license and the five year denial of Respondent's driving privileges because the Appellant failed to prove that in the Springfield Municipal DWI conviction that Respondent either was represented by an attorney or waived his right to an attorney in writing as required by Section 302.060(10) R.S.Mo. 2000.

Standard of Review. The Judgment of the trial court will be affirmed unless there is no substantial evidence to support it; unless it is against the weight of the evidence; or unless the trial court erroneously declares or applies the law.

Murphy v. Carron, 536 S.W.2nd 30 (Mo.banc. 1976).

The Appellant's contention in this case, that he met his burden of proof, is not supported by the record. In order for an individual to be denied a driver's license for five (5) years, the Director of Revenue must show that the individual has two (2) convictions within a five (5) year period. These convictions must be for driving while intoxicated in violation of state law, or a county or municipal ordinance where the Judge in the case was an attorney and the Defendant was

represented by or waived the right to an attorney in writing.

Section 302.010(10) R.S.Mo. 2000. In this case the 1997 conviction relied on by Appellant is a violation of a municipal ordinance (L.F. p.14). This being the case, it was incumbent upon Appellant to show that either the Respondent was represented by an attorney or waived his right to an attorney in writing. The record in this case does not show either (L.F. p.15). The Appellant had the burden of proof.

Section 302.535.1 R.S.Mo. 2000. In this case the Appellant did not make a *prima facie* case to support his decision. In this case the content of the business records of the Department of Revenue did not show that Respondent had an attorney or had waived his right to one in writing. The Appellant attempts to justify his decision by saying, "In addition, when the form asks whether the Defendant was represented by counsel, the box beside the 'yes' response has been checked." (Appellant's Brief, p.11 lines 17 and 18). The copy of the legal file furnished Respondent does not show this, and it could only be supplied by a guess or speculation.

This is not sufficient for Appellant's burden of proof. If there was an ambiguity or discrepancy testimony explaining

such, it should have been offered. Hadlock v. Director of Revenue, 860 S.W.2d 335, 338 (Mo.banc. 1993).

Because the Appellant failed to meet his burden of proof, the trial court's decision should be affirmed.

CONCLUSION

Because the trial court's judgment was supported by substantial evidence, was not against the weight of the evidence, and did not misstate or misapply the law, it should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two (2) copies of Respondent's brief was served on L. Anne Wickliffe, Assistant Attorney General, 221 West High Street, 4th Floor, P.O. Box 899, Jefferson City, Missouri, 65102, by mailing the same, postage prepaid, this___day of February, 2002.

MICHAEL BAKER
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ATTORNEY FOR RESPONDENT

CERTIFICATE OF COMPLIANCE

I, Michael Baker, hereby certify the following:

That in filing Respondent's brief, Respondent's argument is not presented or maintained for any improper purpose and that the legal contentions contained therein are warranted by existing law and that there is evidentiary support in the record and that any denials of factual contentions are warranted on the evidence.

That this brief complies with the limitations contained in Rule 84.06(b); and that the number of words in the brief are 992 and the number of lines of monospaced type are 200. This was determined by using word and line count of the word processing system used in preparing the brief.

I further certify that the floppy disk submitted herein was scanned for viruses and that it is virus-free.

MICHAEL BAKER
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